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No. 81-2317

In The

Supreme Court of the United States

October Term, 1981

RANGER FUEL CORPORATION,

Petitioner,

v.

THE YOUGHIOGHENY AND OHIO COAL COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The unanimous opinion of the United States Court of Appeals for the Fourth Circuit is currently reported at 677 F.2d 378 (4th Cir. 1982) and is reproduced in the Appendix to the petition as Appendix A beginning at 1a.

STATUTE INVOLVED

9 U.S.C. § 4 (1970) provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States

district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

QUESTIONS PRESENTED

1. Whether, after a civil action for breach of a lease had been instituted in a state court by the Youghiogheny and Ohio Coal Company (Y&O) and Bellemead Coal Company (Bellemead) as co-lessors against Ranger Fuel Corporation (Ranger) as lessee, the district court had jurisdiction to compel Y&O to arbitrate that controversy under 9 U.S.C. § 4 when the court would not have had subject matter jurisdiction of the state court action.

2. Even if the district court had jurisdiction, whether it should have dismissed the action by Ranger against Y&O to compel arbitration because Bellemead, as co-lessor under the lease in dispute and co-plaintiff in the state court action, was an indispensable party to the action whose joinder would have destroyed diversity jurisdiction.[1]

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[1] The Questions Presented as set forth in Ranger's petition incorrectly assume that the arbitration provision of the lease requires arbitration of the controversy alleged in the state court action and incorrectly suggest that Y&O and Bellemead joined together as plaintiffs in the state court action in order to avoid federal court enforcement of that provision. Y&O has asserted throughout this litigation that, as a matter of law, the arbitration provision in the lease does not require arbitration of the matters in dispute in the state court action or, at the least, that it was entitled to a jury trial of that issue. Because the Fourth Circuit found that district court lacked subject matter jurisdiction, this issue, of course, was not resolved. Moreover, as the Fourth Circuit recognized, Y&O and Bellemead, as co-lessors under the lease, were indispensable parties to an action under the lease. Thus, they necessarily and properly joined as co-plaintiffs in the state court action.

STATEMENT OF THE CASE

On April 17, 1970, Y&O, an Ohio corporation, and Bellemead, a West Virginia corporation, leased certain coal seams located within approximately 31,000 acres of land in West Virginia to Ranger, a West Virginia corporation. Y&O and Bellemead jointly own undivided interests in coal underlying approximately 7,000 acres of this land; Y&O alone owns coal underlying approximately 24,000 acres of this land. Under the terms of the lease, Ranger agreed to mine the area and to pay royalties on the coal produced. Moreover, subsequent to the lease, Ranger made additional promises concerning mine construction and coal production.

Disputes arose between the lessors Y&O and Bellemead and the lessee Ranger (and its parent corporation the Pittston Company [Pittston])[2] under the lease and under contracts separate from the lease. On August 4, 1980, Y&O and Bellemead together, though represented by separate counsel, filed suit against Ranger and Pittston in Harrison County, Ohio, alleging in nine counts various breaches by Ranger of covenants in the lease, breaches of the separate contracts, and an antitrust conspiracy.[3]

On October 31, 1980, nearly three months after suit was filed, Ranger moved to dismiss the Ohio action based, in part, on an arbitration clause contained in the lease. One week later, Ranger instituted an action against only Y&O in the United States District Court for the Southern District of West Virginia, asking the court to stay the Ohio action and to compel Y&O (but not Bellemead) to arbitrate the claims it had filed against Ranger in the Ohio action. Ranger relied on the Federal Arbitration Act, specifically 9 U.S.C.

[2] For the sake of simplicity, respondent will generally refer only to Ranger as the lessee and defendant in these disputes.

[3] The Court of Appeals accurately described this controversy as "complex". See Appendix A to petition at 5a.

§ 4, as the basis for its petition and asserted diversity of citizenship under 28 U.S.C. § 1332(a) as the jurisdictional basis for the action. Y&O is an Ohio corporation; Ranger and Bellemead are both West Virginia corporations. Contemporaneously with the filing of its action against Y&O in the district court, Ranger filed a separate action against Bellemead in a West Virginia state court seeking an order compelling Bellemead to arbitrate the claims it had filed against Ranger in the Ohio action.

In the district court, Y&O raised several jurisdictional, procedural, and substantive defenses to Ranger's petition, including inadequate notice, lack of jurisdiction, absence of an indispensable party (Bellemead), and the denial of the making of, or default under, an agreement to arbitrate. Y&O demanded a jury trial on the issues relating to the making of and default under an arbitration agreement as specifically provided by 9 U.S.C. § 4. Without providing Y&O the jury trial to which it was entitled, the district court entered an order on December 19, 1980, in which it held that it had diversity jurisdiction and ordered that Y&O must litigate eight of the nine counts in the Ohio action as a condition precedent to litigation. Also, the court enjoined Y&O from proceeding further with all nine counts in the Ohio action.[4] The district court held that Bellemead was not an indispensable party, but stayed its order for two weeks to afford Bellemead an opportunity to intervene. Bellemead did not exercise that option.

On January 9, 1981, Y&O appealed to the United States Court of Appeals for the Fourth Circuit, raising numerous grounds for reversal, including lack of subject matter jurisdiction, absence of an indispensable party (Bellemead), no

[4] The court did not order the arbitration of the ninth (antitrust) count, yet it enjoined Y&O from proceeding with it.

agreement by Y&O to arbitrate the claims raised in the Ohio action, denial of Y&O's right to a jury trial, denial of Y&O's right to due process, and the unwarranted injunction of the state court proceeding. On March 25, 1982, the Fourth Circuit reversed the district court on the ground that it lacked diversity jurisdiction and, in the alternative, that Bellemead was an indispensable party to the action whose joinder would destroy diversity.[5] The Fourth Circuit remanded the case with instructions to dismiss Ranger's action.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit's Finding Of No Jurisdiction Is Entirely Consistent With Supreme Court Precedent And Does Not Create A Conflict Among The Circuits Or Within The Fourth Circuit.

The Fourth Circuit held that the district court could not compel arbitration pursuant to 9 U.S.C. § 4 for lack of subject matter jurisdiction. Under Section 4 of the Federal Arbitration Act, a district court has jurisdiction only if it "save for the [arbitration] agreement, would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. The district court properly identified "the controversy between the parties" as counts one through eight of the Ohio action.[6] Based upon that finding, the Fourth Circuit ruled that, because counts one through eight of the Ohio action include allegations that Ranger breached its obligations to both Y&O and Bellemead, the district court would

[5] Because the Fourth Circuit based its decision on the most fundamental errors assigned by Y&O—lack of jurisdiction and absence of an indispensable party—it did not reach a decision on the other errors assigned.

[6] The Court of Appeals held this finding not to be clearly erroneous. Moreover, Ranger itself had identified the Ohio action as the controversy to be arbitrated in its petition.

not have had jurisdiction of the subject matter of the Ohio action because of a lack of diversity between Ranger and Bellemead.

A. *The Fourth Circuit's Holding Is Not Contrary To This Court's Controlling Decisions.*

Ranger argues that the Fourth Circuit's jurisdictional ruling is contrary to this Court's controlling decisions. Ranger Pet. at 6. Yet Ranger does not clearly identify the "controlling decisions" to which it refers and thus necessarily does not explain why the decision of the Fourth Circuit is contrary to them. The only decisions of the Supreme Court even cited by Ranger in this context were *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974). Ranger Pet. at 8, 12. While those two cases evidence this Court's recognition of the policies favoring arbitration, they have no relevance to the jurisdictional question at issue here. In fact, neither case even arose under or involved 9 U.S.C. § 4—the statute under which Ranger attempted to proceed.

In *Prima Paint, supra,* in the context of a request for a stay of a federal action pending arbitration under 9 U.S.C. § 3, this Court noted the "clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." 388 U.S. at 404. Similarly in *Scherk, supra,* in the context of a motion for a stay of a federal action pending arbitration, this Court acknowledged the noteworthy purpose underlying the Federal Arbitration Act of allowing parties to avoid the costliness and delays of litigation. 417 U.S. at 510-11. Notwithstanding this general encouragement of the enforcement of arbitration agreements in pending federal litigation, this Court has never sanctioned the federal

court enforcement of agreements to arbitrate controversies over which the federal court would not have jurisdiction.

B. *The Fourth Circuit's Holding Creates No Conflict Among The Circuits.*

Ranger also contends that the Fourth Circuit's jurisdictional holding creates a conflict among the circuits. Ranger Pet. at 6. Again, Ranger neglects to identify the conflict, the circuits in conflict, or the cases demonstrating the conflict. Ranger appears to argue that the Fourth Circuit's holding is contrary to those in *C. Itoh & Co. (America)* v. *Jordan International Co.*, 552 F.2d 1228 (7th Cir. 1977), *Hamilton Life Insurance Co.* v. *Republic National Life Insurance Co.*, 408 F.2d 606 (2d Cir. 1969), and *Hilti, Inc.* v. *Oldach*, 392 F.2d 368 (1st Cir. 1968). Ranger Pet. at 7. Ranger's reliance on the foregoing cases in order to demonstrate a conflict among the circuits reveals the extent of Ranger's confusion over the statutory language of the Federal Arbitration Act.

Not one of these cases cited by Ranger involves a question of jurisdiction under 9 U.S.C. § 4. *C. Itoh* and *Hilti, supra,* involved litigation already pending in the federal court in which one party applied for a stay of that litigation under 9 U.S.C. § 3 pending arbitration. Because § 3 of the Federal Arbitration Act applies only to litigation already before the federal court, § 3 cases by definition do not involve the jurisdictional question at issue here. *Hamilton Life, supra,* while a § 4 case, raised no question of the district court's jurisdiction, but only one concerning the validity of the arbitration agreement. 408 F.2d at 609.

The foregoing cases' factual distinctions from the instant case are perhaps as significant as their legal distinctions. Each case involved a third party to a contractual dispute who was *not a signatory* to the arbitration agreement at

issue. The courts of appeals properly found that the parties to the arbitration agreement should proceed with arbitration despite the existence of the third party.[7] Unlike the situation in those cases, the third party to the instant contractual dispute—Bellemead—is a signatory to the arbitration agreement and its interests are coexistent with those of Y&O, the party Ranger singled out for the federal court action. Because all of the parties to the underlying controversy and to the arbitration agreement at issue were not before the district court and could not be brought before that court, the Fourth Circuit properly held that the court lacked jurisdiction to compel arbitration.

C. *The Fourth Circuit's Holding Creates No Conflict Within The Fourth Circuit.*

Finally, Ranger suggests that the Fourth Circuit's jurisdictional holding creates a conflict within the Fourth Circuit in light of its earlier decision in *In re Mercury Construction Corp.*, 656 F.2d 933, *reh. den.*, 664 F.2d 936 (4th Cir. 1981), *cert. granted sub nom. Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ... U.S. ....., 71 L. Ed. 2d 647 (1982). Ranger Pet at 9. *Mercury* involved separate disputes between a building owner and its contractor, who were parties to an arbitration agreement, and between the owner and its architect, who was not party to any arbitration agreement. In order to avoid arbitration of its dispute with the contractor, the owner filed a "contrived" and "reactive" action in state court against both its contractor and its architect, 656 F.2d at 938, 944, seeking, *inter alia*, a declaratory judgment that its dispute with the contractor was non-arbitrable. The Fourth Circuit held that the

[7] The court in *C. Itoh* did not order arbitration due to a finding of no agreement to arbitrate.

owner could not avoid federal enforcement of its arbitration agreement with the contractor under 9 U.S.C. § 4 simply by filing a preemptive state court action and by joining its claims against the architect in that action. As with the other circuit court cases cited by Ranger, the existence of an independent basis for the federal court's jurisdiction was not at issue. In short, no inconsistency exists between *Mercury* and the instant case, thus explaining why the two circuit judges common to the *Mercury en banc* court and the panel of the Fourth Circuit below, Chief Judge Winter and Circuit Judge Butzner, joined in the opinion of the court in both cases.[8]

D. *The Fourth Circuit's Holding Entails No Issue Requiring Resolution By This Court.*

The question that Ranger urges this Court to answer here has already been answered by Congress in the express language of the Federal Arbitration Act. Federal courts will enforce arbitration agreements in disputes being litigated in federal court by staying such litigation pursuant to 9 U.S.C. § 3 pending arbitration. In disputes not being litigated in federal court, however, the federal courts can only enforce an arbitration agreement if it would have, "save for such agreement, jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties". 9 U.S.C. § 4. The controversy between the parties, as well as the suit that arose out of such controversy—the Ohio action—involve Y&O, Bellemead, and Ranger. As the Fourth Circuit recognized, the district court would have lacked jurisdiction over such suit, and thus had no jurisdiction to order arbitration or to enjoin the pending state court action.

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[8] The third member of the panel below, Circuit Judge Haynsworth, who joined in the opinion of Circuit Judge Butzner, did not sit with the *en banc* court that heard argument in *Mercury*.

II. The Fourth Circuit's Decision That The Action Should Be Dismissed Because Of The Absence Of An Indispensable Party Is Not In Conflict With Applicable Supreme Court Decisions.

After finding that the district court lacked the requisite subject matter jurisdiction under 9 U.S.C. § 4, the Fourth Circuit held that the action should otherwise have been dismissed because Bellemead was an indispensable party whose joinder would have destroyed diversity jurisdiction. The court reasoned that whether the proper focus is upon the underlying controversy being litigated in the Ohio action or simply upon the petition in federal court to compel arbitration and stay the litigation of that controversy, Bellemead was indispensable to the action. Bellemead, as co-lessor with Y&O of jointly owned coal interests and as co-plaintiff with Y&O in the Ohio action, was found to be a party who should have been joined in the federal action if feasible under Rule 19(a), Fed. R. Civ. P. A pragmatic consideration of the factors prescribed by Rule 19(b), Fed. R. Civ. P., led the Fourth Circuit to hold that the federal action brought by Ranger in Bellemead's absence should have been dismissed.

Ranger contends that the Fourth Circuit's holding is in conflict with applicable Supreme Court decisions and suggests that the Supreme Court's "outdated and irrelevant" decision in *Shields* v. *Barrow*, 17 How. (58 U.S.) 130 (1855) is not an "applicable decision." Ranger Pet. at 13-14. Ranger again neglects to specify which "applicable decisions" of the Supreme Court are in conflict with the Fourth Circuit's decision below. And while Ranger boldly asserts that *Shields* v. *Barrow* is "outdated and irrelevant," its only support for this assertion is language contained in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 123-25 (1968) advising against using *Shields* as a substitute for Rule 19 analysis. The Fourth Circuit did not use *Shields* as a sub-

stitute for Rule 19 analysis, but, rather, found support in *Shields* for its application of the Rule 19 factors. Moreover, this Court recognized in *Provident Tradesmens, supra,* that the principles stated in *Shields* "are still valid today, and they are consistent with the requirements of Rule 19." 390 U.S. at 124.

A review of the relevant Supreme Court precedent amply demonstrates that, contrary to Ranger's assertion, the Fourth Circuit's holding is entirely consistent with applicable Supreme Court decisions. The Supreme Court in *Calvert* v. *Bradley,* 16 How. (57 U.S.) 580 (1853), recognized early on that all lessors must join in an action based on breach of covenants running to all lessors. The logic and conclusion of this Court's opinion in *Calvert* have been consistently followed even after the codification of the indispensable party principles in Rule 19. *See Harrell & Sumner Contracting Co.* v. *Peabody Petersen Co.,* 546 F.2d 1227, 1229 (5th Cir. 1977); *Bry-Man's Inc.* v. *Stute,* 312 F.2d 585 (5th Cir. 1963). The Ohio action brought by Y&O and Bellemead involves breaches of covenants running to both Y&O and Bellemead, the co-lessors under the lease. The Ohio action also involves Y&O's and Bellemead's joint claim for rescission of the lease. As this Court held in *Shields* v. *Barrow, supra,* all parties to a contract are indispensable in an action for rescission. *Accord, Tewa Tesuque* v. *Morton,* 498 F.2d 240 (10th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975); *Schutten* v. *Shell Oil Co.,* 421 F.2d 869 (5th Cir. 1970); *Kentucky Natural Gas Corp.* v. *Duggins,* 165 F.2d 1011 (6th Cir. 1948). Such "applicable decisions" of the Supreme Court confirm the validity of the Fourth Circuit's holding that Bellemead is indispensable to an action to compel arbitration of the controversies underlying the Ohio action and to enjoin that action.

Ranger asks this Court to exercise its supervisory power

to review the Fourth Circuit's application of the factors specified in Rule 19(b), Fed. R. Civ. P. While this Court has offered some guidance to lower courts concerning the proper application of those factors, *see Provident Tradesmens, supra,* no case has been found in which this Court has reviewed a court of appeals' consideration of those factors. Indeed, this Court indicated in *Provident Tradesmens, supra,* that the indispensable party determination must be based on factors varying with each case. 390 U.S. at 118-19. Ranger has failed to demonstrate any compelling reason for this Court to undertake such a review in *this* case, or to show what precedential value such a review could have.

A review of the Fourth Circuit's consideration of the Rule 19(b) factors demonstrates that review of this decision is unnecessary. The prejudice to Bellemead caused by a judgment in its absence and the inadequacy of the relief granted in its absence were pragmatically analyzed by the Fourth Circuit, as required by *Provident Tradesmens, supra.* The factor found most compelling by the Fourth Circuit was the fact that Ranger will have an adequate remedy if the federal action is dismissed. Ranger has raised the arbitration clause as a ground for dismissal in the Ohio action, which has all the parties to the controversy before the court.[9] Ranger will not be denied resolution of its rights, if any, to arbitration, but only a federal forum for such resolution.[10] Con-

[9] While Ranger complains throughout its petition that the Fourth Circuit's decision will require multiplicity of litigation (Ranger Pet. at 12-13, 16), it is *Ranger's* position that has already resulted in its claims to arbitration being raised in three separate suits.

[10] Curiously, Ranger claims that the Fourth Circuit should have ordered arbitration of the counts of the Ohio action not involving Bellemead. Such relief, however, is impossible to fashion on this record. Moreover, Ranger's claim totally ignores the fact that it sought arbitration of and an injunction of the entire Ohio action, thus identifying the controversy to be arbitrated and the parties to it.

trary to Ranger's argument, the Federal Arbitration Act does not alter this analysis, inasmuch as § 4 provides Ranger no guarantee of a federal forum for the enforcement of its alleged rights to arbitration of this controversy. In summary, the Fourth Circuit was understandably unable to discern any prejudice to Ranger from a dismissal of its action which could outweigh the prejudice to Bellemead from allowing the action to proceed. Ranger has failed to cite a single case or relevant fact that could lead this Court to find otherwise.

CONCLUSION

For the foregoing reasons, Y&O respectfully requests this Court to deny a writ of certiorari to review the judgment of the Fourth Circuit.

Respectfully submitted,

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July 22, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 1982, three copies of the Respondent's Brief in Opposition were mailed, first-class, postage prepaid, to W. Warren Upton, Esquire, Jackson, Kelly, Holt & O'Farrell, 1500 One Valley Square, P. O. Box 553, Charleston, West Virginia 25322, Counsel for Petitioner and that all parties required to be served have been served.

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